No. 3629

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HERTA MARLOW,
Appellant,

vs.

CHARLES PAGININI, as administrator of the estate of David K. Marlow, deceased,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Having carefully examined the opinion of the Honorable Court we think that with propriety we may ask the court to consider whether this case be not one in which it will be proper to grant a rehearing to the appellant upon the following grounds:

I.

We believe that the opinion of this court does not take into account the fact that the policy in

question, in definite and express terms establishes the date as of which a change of beneficiary shall take effect as the date when the insured signed the written notice of change and that all other conditions relating to change of beneficiary are conditions subsequent, which, in their nature and under the express terms of the policy, may be performed as well after as before the death of the insured; and, while performance of these conditions subsequent was necessary in order to prevent the change of beneficiary from being defeated, the time of performance thereof has no bearing upon the date as of which the change is effective.

The portion of the policy prescribing the mode of change of beneficiary consists of two sentences and reads as follows:

> "Every change of beneficiary must be made by written notice to the company at its Home Office accompanied by the Policy for indorsement of the change thereon by the company, and unless so indorsed the change shall not take effect. After such indorsement the change shall relate to and take effect as of the date the insured signed said written notice of change whether the insured be living at the time of such indorsement or not."

A critical examination of the foregoing provisions of this policy in relation to the method of effecting a change of beneficiary will show:

1. That the policy does not provide that the change of beneficiary shall not take effect *"until"*

indorsed on the policy, but that it shall not take effect "*unless*" so indorsed;

2. That any change of beneficiary, after such indorsement, shall "take effect as of the date the insured signed the written notice of change", and not as of the date of presentation of the written notice to the company at its Home Office;

3. That there is no express provision of the policy that the insured shall take any preliminary steps whatsoever looking to the indorsement of the change of beneficiary on his policy during his lifetime; and

4. That the policy expressly provides that every such notice, without limitation as to time of presentation for indorsement, may be indorsed on the policy whether the insured be living or not, and when so indorsed shall relate to and take effect as of the date when the insured signed the written notice of change.

The appellee has not alleged fraud, accident or mistake and has not asked for a reformation of the contract, and it should require very potent reasons before we should now undertake to make a different contract for the parties than they made for themselves.

The company could in its contract dispense with immediate delivery of the written notice, as a condition precedent, and that is exactly what it did do when it inserted in its policy a provision that any notice of change of beneficiary, after indorsement on

the policy, should relate to and take effect as of the date when the insured signed the written notice, whether the insured be living at the time of such indorsement or not.

II.

We believe that the authorities cited by this court are not applicable to this case, because in each of the cases cited there was a clear failure on the part of the insured to comply with some condition precedent prescribed in the policy or by-laws of the insurance society, and hence the change of beneficiary was not effective as of a time prior to the death of the insured. Whereas, in the present case, the insured died May 30, 1919, and under the terms of his policy the change of beneficiary was effective as of March 18, 1918, the date when he signed the written notice of change, subject only to subsequent indorsement on the policy, upon presentation at the Home Office.

We will briefly review the cases cited in the opinion of this court.

In Abbott v. Supreme Colony United, etc., 190 Mass. 67, the following indorsement appeared on the back of the certificate, viz.:

> "A change of beneficiary in any other manner than as directed by the constitution will not be legal or binding on the order."

The constitution provided as follows:

> "Any member desiring to change his beneficiary shall give a written declaration thereof to the Secretary of the Colony signed by him and witnessed by two reputable witnesses and acknowledged before Justice of the Peace," etc.

The written declaration by the insured was acknowledged before a Justice of the Peace and witnessed by him, but was signed by no other witness.

The citation of French v. Provident Savings Life Assurance Society, 91 N. E. 577, in the brief for appellee and in the opinion of this court seems to be an erroneous citation. But all that counsel for the appellee claims for the case is, that it holds that the policy must be produced for indorsement during the life of the insured, in a case where the policy expressly provides that this must be done.

In the case of McLaughlin v. McLaughlin, 104 Cal. 174, the constitution and laws of the order contained the following provision:

> "Section 172. A member in good standing may, at any time, surrender his or her relief fund certificate, and a new certificate shall then be issued, payable to such person or persons related to or dependent upon him or her, as the member may direct, upon payment of the certificate fee ($1)."

The member talked about changing the beneficiary, but died without surrendering the old certificate, without making application for change of beneficiary, and without paying the required fee.

In the case of De Silva v. Supreme Council, 109 Cal. 375, the court said:

> "There is no by-law or constitutional provision of the society, or statute of the state, providing for a change or substitution of beneficiaries in a certificate of membership issued by this society." * * * "Most of the decisions seem to concur in holding that, in case of mutual benefit societies, the beneficiary named in the certificate acquires no vested right to the benefit to accrue upon the death of the member, until such death occurs. The member may, therefore, during his lifetime, exercise the power of appointment without other limits or restrictions than such as are imposed by the organic law of the society or the rules and regulations adopted in conformity therewith."

In that case the court held that a provision in the will of the insured disposing of the proceeds of the insurance did not operate as a change of beneficiary, but that a written declaration of change of beneficiary left among the papers of the insured would have been an effectual mode of exercising the right to change the beneficiary.

In the case of Tillman v. John Hancock Life Insurance Co., 50 N. Y. Sup. 470, by the terms of the contract of insurance, the insured had the right

> "to change the beneficiary from time to time, *with the consent of the company,* by written notice to said company".

The notice was duly given and received by the Home Office, but the company withheld its consent to the proposed change of beneficiary.

In not one of the foregoing cases was there any provision contained in the policy, or constitution or by-laws of the society, which permitted the indorsement of the change of beneficiary or any other act in connection therewith to be made or performed after the death of the insured, and in not one of these cases was there any provision that a change of beneficiary should take effect as of a date prior to the full and final performance of the very last act to be performed in connection with such change of beneficiary.

Hence, those cases can be of no assistance in construing or applying the provision of the policy in question reading as follows:

> "After such indorsement the change shall relate to and take effect as of the date the insured signed said written notice of change whether the insured be living at the time of such indorsement or not."

Wherefore, upon the foregoing grounds this appellant respectfully prays this Honorable Court to give her a rehearing of said cause.

Dated, San Francisco,
January 30, 1922.

ERNEST K. LITTLE,
Attorney for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
January 30, 1922.

ERNEST K. LITTLE,
Attorney for Appellant and Petitioner.